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QUESTIONS PRESENTED

1. Whether, in light of the extensive record of defendants' admitted illegal behavior, and their continued obstruction of access to health care facilities and dangerous grabbing, shoving, crowding and harassing people trying to enter or leave these facilities despite a temporary restraining order (TRO) prohibiting this conduct, two challenged provisions in a preliminary injunction are no more burdensome to defendants' free speech rights than necessary to protect the governmental interests in ensuring safe provision of health care, medical privacy, public safety and free flow of traffic, protecting private property rights, and securing safe conditions for exercising an important constitutional right. The pertinent provisions of the preliminary injunction are:

a. Paragraph 1(b), which prohibits demonstrating within a fixed "buffer zone" 15 feet from driveway and doorway entrances to healthcare facilities, but allows two "sidewalk counselors" to enter the "buffer zone";

b. Paragraph 1(b), which establishes a 15 foot "bubble zone" around vehicles and people seeking ingress to or egress from the health care facilities, into which only two demonstrators may enter to engage in peaceful, nonthreatening "sidewalk counseling"; and

c. Paragraph 1(c), which provides that people have the right to refuse "sidewalk counseling" and to walk away, and that when people do so, the "sidewalk counselors" must "cease and desist" and back away 15 feet from the targeted people.

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STATEMENT OF THE CASE

Whether an injunction "burdens no more speech than necessary to serve a significant government interest," *Madsen v. Women's Health Center*, 512 U.S. ---, 114 S. Ct. 2516, 2525 (1994), necessarily is a fact-sensitive inquiry. Yet Petitioners notably ignore or mischaracterize the extensive factual record of illegal behavior, including blockades, continued physical obstruction of plaintiff health care facilities despite arrests and a prior injunctive order, and ongoing dangerous harassment and intimidation of patients and staff. To cure that omission, Respondents present in substantial detail the facts that were before the district court.

This case involves a persistent, continuous campaign by defendants to shut down or otherwise interfere with the provision of reproductive and gynecological health care by hospitals and clinics in the Buffalo and Rochester, New York area. Beginning in 1988, defendants commenced a series of mass blockades and other disruptions of area health care facilities. The district court found that defendants use three categories of tactics to obstruct clinics and harass people using the facilities. The first is a "blockade," in which large numbers of demonstrators trespass on medical center property and sit in or lie down in front of entrances in order to effect a complete barrier, thus blocking access to and egress from the health care facilities. *Pro-Choice Network v. Project Rescue*, 799 F. Supp. 1417, 1424 (W.D.N.Y.- 1992). During some "blockades," defendants invaded clinic facilities and "chain[ed] themselves together in order to make it more difficult for police to remove them." *Id.* at 1424.

The district court labeled the second obstructive strategy "constructive blockades," because the actions have the same purpose and effect as full-fledged blockades: to prevent patients from entering the clinics and to force people "to run a gauntlet of harassment and intimidation" when they seek to enter. *Id.* Constructive blockade activity consists of congregating in or near driveways in order to obstruct these entrances, making loud and disruptive noise, and "crowd[ing] around people trying to enter the

facilities in an intimidating and obstructing manner, and grab[bing], push[ing] and shov[ing] the patients, patient escorts and staff." *Id.*

The third type of intimidating, interfering, and harassing activity is "sidewalk counseling," which involves a face-to-face encounter between demonstrators and their targets, purportedly to proffer literature and to attempt to persuade patients not to have an abortion. Because of the "privacy concerns of the patients, even peaceful counseling, when conducted in the compressed space at the entrances of the medical facilities, often erupts into a charged encounter between 'sidewalk counselors,' patients and patient escorts." *Id.* at 1425. The district court further found that "sidewalk counseling" often was not peaceful, but rather involved "harassing, badgering, intimidating and yelling at the patients," and "crowd[ing] around patients, invad[ing] their personal space and rais[ing] their voices to a loud and disturbing level." *Id.*

The district court found that these tactics impeded safe and unfettered access to and egress from the facilities, intimidated people seeking access, caused serious health risks and sometimes physical injury, and disrupted the "atmosphere necessary for rendering safe and efficacious health care." *Id.* at 1424.

1. ***Proceedings in the District Court***

Threatened with another in an ongoing series of mass blockades that defendants announced would occur on September 28, 1990, Respondents commenced this case on September 24, 1990, and sought a TRO. Respondents are several physicians and health care facilities in the Buffalo and Rochester New York area that provide gynecological and family planning health care, including abortion services, and the Pro-Choice Network of Western New York, a volunteer organization whose goal is to maintain safe and legal access to abortion.

Evidence introduced regarding the location and

configuration of each plaintiff health care facility[1] revealed that, given the nature of the sites, defendants' activities also affected other health care institutions and businesses. For example, plaintiff Womenservices was next door to a post office, and shared a driveway ramp with the U.S. Postal Service. Defendants often blocked postal trucks. (Tr. 186-88, 433-36, 461-64)[2] Plaintiff Dr. Davis' office was in a building with other businesses and residential apartments, and the property manager received complaints from tenants about the obstruction and noise from anti-abortion demonstrators. (Walker Tr. 228) Plaintiffs Dr. Press and Dr. Wortman provided a full range of gynecological and obstetrical services, including treatment for high risk pregnancies and laser surgery for ovarian cysts, endometriosis, fibroid tumors, and other conditions. (Tr. 876) Erie Medical Center shared a medical office building with many other doctors, and was located across the street from Buffalo General Hospital. People accosted by defendants often were not abortion patients, but those seeking other medical services in the building. (Tr. 293-94) Plaintiffs Alexander Women's Group and Highland Obstetrical Group both are group ob-gyn practices located inside Genessee and Highland Hospitals, respectively, where anti-abortion demonstrators harassed patients seeking many kinds of medical treatment,

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[1] The district court heard testimony about each location and saw photographs. (Pls. Exs. 24 -29 at Prelim. Inj. Trial; Exs. 1-A -- 1-I at Walker contempt trial) The court also requested, and plaintiffs later submitted on Sept. 18, 1991, site plans indicating the proposed 15 foot buffer zones. R. 497. (These site plans have been lodged with this Court.) The plans show that at every location, the 15 foot buffer zone around driveways and doorway entrances allows defendants to congregate on the sidewalks or grassy strips adjacent to the health care facilities.

[2] Citations to the preliminary injunction trial transcript are designated as "Tr."; to testimony at the contempt trials is referred to as "Walker Tr." or "Schenck Tr." etc. "JA" refers to the Joint Appendix; "R." indicates the docket sheet record number.

including cancer care and psychiatric counseling. (Tr. 733-41)

The defendants included approximately 50 individuals who had repeatedly engaged in illegal blockade activities at plaintiffs' medical facilities. All individual defendants had previously been arrested and convicted for participating in blockades, trespasses, or harassment at the medical facilities. The complaint chronicled 18 such blockades from the spring of 1988 through the spring of 1990. (JA 56-62) Petitioner Paul Schenck was one of the most persistent lawbreakers: He had three criminal convictions for blockades or "chain gang" invasions. (Second Amended Complaint ¶ 17, JA 38) Petitioner Dwight Saunders was convicted for leading and participating in a blockade of plaintiff Womenservices in October 1989. (JA 39) In their answer defendants admitted their arrests and convictions. (JA 72-74)

After a hearing on plaintiffs' request for a TRO, on September 27, 1990 the district court issued an order enjoining defendants from blocking or obstructing or trespassing on plaintiffs' facilities, and from "physically abusing or tortiously harassing" people seeking access to or egress from the health care centers. The TRO also prohibited demonstrating within 15 feet of people seeking access to the health care facilities, but it did not establish any "buffer zone" the around entrances. The TRO allowed "sidewalk counselors" into the 15 foot clear zone around people, but required "sidewalk counselors" to "cease and desist" if someone wanted to walk away and not be counseled. (The TRO is at JA 22-26.) Shortly after entering the TRO, the district court issued a written clarification, stating that the injunction was "directed to activities at the sites chosen for demonstrations," i.e., at the clinics themselves. (JA 28-29) Petitioners have never thereafter sought any clarification or modification regarding the injunction's geographical range.

While defendants complied with the TRO by not carrying out their threatened mass blockade on September 28, 1990, their demonstration that day at Dr. Press' office made so much noise it disrupted health care. (Tr. 1012-13) Soon after the TRO's issuance

they resumed the "constructive blockade" and "sidewalk counseling" tactics. The district court found that these tactics congested the clinic entrances, streets, and sidewalks to such a degree that access and egress were impeded, and that patients and staff were intimidated, harassed, and physically threatened. 799 F. Supp. at 1424-26. Also shortly after the TRO, several incidents of blocking and harassing prompted plaintiffs to file motions for contempt against five defendants. Contempt charges were filed against Nancy Walker for trespassing, harassing patients, and impeding and hindering access at plaintiff Dr. Davis' clinic on November 29, 1990, and again at plaintiff Buffalo GYN Womenservices on December 1, 1990. (JA 79-101) Bonnie Behn and Carla Rainero were charged with harassing and stalking a patient the length of a city block and terrorizing her with a videocamera outside Womenservices on October 20, 1990. (JA 102-20) Petitioner Paul Schenck and Robert Schenck were charged with blocking cars and the doorway entrance at Womenservices on December 30, 1990. (JA 121-49)[3]

Defendants consented to keeping the TRO in effect until the court could resolve the contempt charges and hold a full hearing on plaintiffs' request for a preliminary injunction. On various dates between February and November 1991, the court held trials on these contempt charges, and this evidence became part of the record in support of the preliminary injunction. All

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[3] Subsequent to the preliminary injunction trial, but prior to the issuance of that order, Petitioner Schenck was again charged with violating the TRO at Womenservices on September 28, 1991. (R 124) When fashioning the preliminary injunction the district court had before it the sworn affidavits detailing the incident. These affidavits established that Schenck lay down in the street in front of plaintiff Dr. Slepian's car, preventing him from entering the driveway. After Dr. Slepian backed down the street, parked, and tried to get to the clinic on foot, Schenck rushed at him, trying to push others out of the way, in the process knocking down and injuring another anti-abortion demonstrator. After the contempt hearing, the court found Schenck in contempt. (R. 263)

five individuals were found, by clear and convincing evidence, to have violated the TRO on six occasions.[4] The court also held a preliminary injunction hearing during 11 days in March and April 1991. The court heard extensive testimony that despite the prohibitions on blocking and harassment in the TRO, defendants and other demonstrators, in numbers regularly ranging from 15 to 60 (Tr. 311-13), persisted in congregating in driveways and in front of doorways, physically and visually impeding use of the entrances. The court found, "the presence of numerous demonstrators in the driveway entrances intimidates and impedes the drivers of cars...and creates a danger to both the occupants of the cars and the demonstrators themselves.... On some occasions, the drivers and occupants of the cars trying to enter the clinic parking lots are so intimidated and confused by the demonstrators that they leave the area thereby causing those occupants seeking health care to suffer a delay in obtaining such care." 799 F. Supp. at 1424.

The district court also heard testimony that despite the TRO, defendants continued to crowd around cars and pedestrians, frequently engaging in grabbing, pushing, shoving and yelling. The district court found that defendants forced "patients to run a gauntlet of harassment and intimidation," and that defendants' "activity causes stress and sometimes even physical injury to the patients, patient escorts, and medical staff, and disrupts the atmosphere necessary for rendering safe and efficacious health care." *Id.* These findings, which have never been challenged by Petitioners, and are amply supported by the testimony, are entitled to deference. *Madsen*, 114 S. Ct. at 2527.

a. Evidence of Blockades. Although defendants stipulated

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[4] The court also found that Petitioner Paul Schenck had given false testimony, and referred the matter to the U.S. Attorney. JA 136. Schenck was indicted by a grand jury, and pled guilty to making false statements under affirmation. 93 Cr. 285S (W.D.N.Y. 1993)

that mass blockades could be enjoined, and effectively conceded at trial that they had blockaded plaintiffs' health care facilities,[5] Petitioners imply that the stipulation and temporary abandonment of this one tactic of obstruction somehow renders irrelevant the numerous blockades suffered by plaintiffs. To the contrary, these blockades formed a crucial basis for plaintiffs' request for injunctive relief, and they color the entire context of defendants' persistent unlawful activities. For Petitioners to admit to their convictions and stipulate to blockades, and then to tell this Court that "there were no blockades" (Cert. Pet. 5), and to further argue that there is no record of obstructed access or illegal behavior (Pet. Br. 14, 30), is utterly disingenuous. The district court stressed that plaintiff health care facilities had been victims of blockades that stopped their operation on numerous occasions, 799 F. Supp. at 1424, and further found that the blockades particularly hampered law enforcement, thereby necessitating injunctive relief. *Id.* at 1426-27. Petitioners would also have this Court believe that other than blockades, all their activity was "peaceful protest." The record overflows with evidence to the contrary.

Witnesses described how several blockades shut down the clinics and risked serious medical dangers. During a blockade of Womenservices in October 1989, protestors laid down in front of cars, completely blocking the driveway and doorway entrances for several hours so "nobody could get through," including police cars and postal trucks. (Tr. 186, 437-38) During a 1988 blockade, Womenservices "was blockaded to the point for two days I could not get patients in at all." (Tr. 513) During one of many blockades at Dr. Press' medical office, demonstrators invaded the medical office building, completely blocking the stairways and hallways, so that a nurse "had to come in through the window." (Tr. 1000) A blockade at Dr. Wortman's left him "trapped in [his] office for about three hours," and he could not get out to go to the hospital

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[5] Defendants objected to blockade testimony, on the ground that their stipulation rendered it unnecessary.

to treat a patient with emergency acute post-hysterectomy bleeding. (Tr. 885-86)

b. Evidence of Obstruction and Other Unlawful "Constructive Blockade" Activity Before and After the TRO.

In addition to the full-fledged blockades, witnesses described in detail numerous other tactics defendants employed to persistently obstruct access to, trespass on or damage the plaintiff health care facilities. The district court called this range of activity "constructive blockades," because it achieved the same effects of obstruction, intimidation, and physical danger.

Defendants regularly congregated in the driveway entrances "milling and circling," moving very slowly, like they were "daring" drivers to hit them. (Tr. 83) Defendants repeatedly blocked driveways: They "would try and stop the cars, they would hang onto the cars, try and scream in the windows and just generally impede the progress of the car into the driveway.... [T]here were at least four or five on any given car." (Tr. 172-73). On a "typical" day, this conduct detained cars in the street for several minutes, or entirely prevented cars from getting in the driveways. (Tr. 393, 185-87, 519-20, 1235-36) Dr. Wortman testified that the driveways and entrances to his office were regularly blocked and obstructed "about twice a month," and that because of the narrow confines "usually two individuals can block one of those entrances quite easily." (Tr. 895)

Extensive testimony recounted how the throngs of demonstrators in or near the driveways made it impossible for drivers to see the entrances. In their confusion, drivers would circle around the block, missing the clinic entirely, or drive away to find a pay phone, or give up trying to get into the parking lots. (Tr. 152-53, 187-90, 221-22, 276, 344-48, 494; JA 130-31) Frequently, the defendants plastered literature or signs up against car windows, blocking the drivers' vision. (Tr. 276-77) On a number of occasions, defendants intentionally confused drivers by carrying erroneous signs marked "clinic parking" that actually

directed drivers *away* from the clinic parking lots. (Tr. 353-54) People thus unable to find or get into the driveways faced two dangerous choices: park on the street a block or two away and try to get to the clinic by foot, when they would be surrounded, jostled, and screamed at by protestors; or leave the area and forego the scheduled health care or try to reschedule for a later and medically more dangerous time. 799 F. Supp. at 1424, 1427.

Staff members at the plaintiff facilities testified how they were particularly singled out and blocked, or surrounded and screamed at regularly as they tried to enter the parking lots. (Tr. 519-20, 906, 983) For example, Susan Ward, a patient counselor at plaintiff Womenservices, testified that even after the TRO, she was blocked every day when she came to work. (Tr. 620-21) On a recent winter day, despite the TRO's prohibition on blocking, "I could not get into the driveway at all, I had to drive around the corner and climb over a snow bank and come around." (Tr. 621) Marilynn Buckham, Executive Director of Womenservices, testified that regularly being obstructed, badgered, and harassed while coming to work unnerved her and her staff and undermined the calm state of mind essential for providing health care. (Tr. 518-24, 704) Other health care personnel described the experience as being "terrorized" by the defendants, making it much more difficult to provide health care when agitated and "nerve-wracked" by these confrontations. (Tr. 618-19, 902-05, 982, 998, 1002)

There was also ample testimony about the dangers posed when driveways and adjacent sidewalks were obstructed. Witnesses described how confused and nervous drivers "get frightened and gun the engine and go whipping down the driveway. That is one of the things that...really scares us. We're afraid somebody is going to get hurt." (Tr. 353, 92-93, 190) Patient escort Sholes was clipped by a panicked driver whose visibility was blocked by defendants. In another incident a demonstrator pushed her, causing her to slip on ice and fall under a car trying to get in the driveway. (Tr. 343-44) On another occasion defendants placed their babies in strollers across the

driveway to block it, and approaching drivers' view was obstructed due to the phalanx of demonstrators lined up along the driveway edge; some of the helpless babies were nearly run over. (Tr. 344-45)

In addition to the constant clogging of entrances and swarming around cars, defendants repeatedly trespassed on the facilities, even after the TRO specifically enjoined such conduct.(Walker Tr. 228-29; Tr. 178, 295, 348-49, 352, 815-16, 881-83) Indeed, defendants admitted that they ignored the prohibitions against trespassing. (Walker Tr. 1058-61; Tr. 1405) At plaintiff Erie Medical Center, located in a medical office tower, defendants frequently trespassed into the building and blocked people trying to get into the elevator (Tr. 204-05, 238, 247, 295), or, despite the TRO, invaded the clinic's waiting room on the fifth floor. (Tr. 349, 352, 359) Dr. Wortman described a defendant who regularly followed patients into the building and elevator, refusing to let them off the elevator until he was physically separated from the patients. (Tr. 884-85) The very morning of his testimony, a defendant trespassed into his building and harassed his patients until the police were called. (Tr. 880-81)

Witnesses also described instances of anti-abortion demonstrators vandalizing the property at the clinics, including destroying medical equipment and instruments (Tr. 892); kicking in walls (Tr. 479); breaking entrance doors (Tr. 906); gluing, gumming up, or driving wood into the locks (Tr. 476-80, 550-52, 827, 836); rubbing a dead skunk around the doorway and leaving the carcass (Tr. 827); and defacing, ripping down, or throwing paint on signs indicating parking lot entrances (Tr. 473). Womenservices also had received bomb threats (Tr. 526), and doctors, clinic staff, and their families had received threats of death or bodily harm (Tr. 522-24, 986, 997-99).

Witnesses were emphatic that this obstructive and intimidating activity continued unabated *after* the TRO. Within a few weeks after the TRO, the frequency and intensity of defendants' obstructive and harassing activity returned to the

dangerous level of pre-TRO disruptions. (Tr. 63-66, 155-56, 177-78, 283-86, 312-13, 346-48, 35-60, 539-42) The Executive Director of Womenservices testified that after a two to three week period of calm following the TRO, defendants' obstructive and harassing conduct then "escalate[d] and [went] back to the way it was before the TRO...it was like they were flagrantly violating or questioning the TRO." (Tr. 540) When asked whether the TRO helped to keep the driveways clear or to keep patients from being surrounded by demonstrators thronging in their faces, clinic escort Warnes replied: "I have not seen anyone abiding by the rule for quite some time." (Tr. 178) Even after the TRO, she testified, defendants still blocked the driveway entrances "more regularly than not. They have slowed down to block cars, I've seen people lay in the driveway to block cars, I've seen them kneel in the driveway to block cars." (Tr. 185) Clinic escort Sholes recounted a conversation with Petitioner Dwight Saunders, in which he insisted that defendants had a right to congregate in the middle of the clinic driveways despite the TRO. Because of this attitude, she explained, "we have never been able to absolutely get the driveway clear." (Tr. 347) She described an incident only a week before the preliminary injunction hearing, in which a defendant demonstrated at Womenservices in violation of a city court order of protection. Upon her arrest, the remaining demonstrators "began to throng the driveway and...stop cars....When the cars stopped, they would knock on the window, or they would hold up the literature, or they would yell in the car. And the cars that did manage to get through...they would scream down at them." (Tr. 278) Linda Stadler, the office manager for Dr. Press, also testified that, despite the TRO, the driveway to his medical office was still regularly impeded and obstructed by milling demonstrators, and that defendants' screaming could still be heard by staff and patients inside the office. (Tr. 983-85, 1006-07, 1012) Several witnesses described Petitioner Paul Schenck's blatant post-TRO defiance of the prohibition on blocking and impeding. On December 29, 1990, Schenck laid his body against a car trying to

get into Womenservices' driveway, refusing to let it pass, "insisting that they stop and talk to him." (Tr. 92-93; *see also* JA 131). Schenck trespassed on Womenservices' private property in order to block the front door entrance with his body (JA 129-30), and pinned patient escort Warnes up against the door, trapping her and making her "hysterical" and "intimidated." (Tr. 184)

c. Evidence of Harassment, Crowding, and Intimidation by "Sidewalk Counselors." Testimony about the conduct of so-called "sidewalk counselors" demonstrates that while "sidewalk counseling" may begin as a relatively innocuous attempt to leaflet or to engage people in discussion, it usually escalates into a charged, threatening, invasively close harangue with the "sidewalk counselors" shouting directly into patients' faces.

Witnesses characterized encounters with sidewalk counselors as running a gauntlet of abuse, as being "surrounded" by people who get "very close physically" and scream. (Tr. 55, 174-75) Extensive testimony established that large numbers of demonstrators often surrounded their targets (Tr. 263-64, 280-81, 284-85), even though defendants' own witnesses acknowledged that being approached on the street by more than one stranger would be very intimidating. (Tr. 1262) Sholes described how sidewalk counselors, swarming around patients, effectively trap them: "They would surround the woman...it looked like a feeding frenzy. Because the woman would be absolutely vulnerable... engulfed by this large group of people. And it would be very difficult sometimes for them even to walk. They would be caught and be forced to stand and listen to all of this." (Tr. 282) The large number of demonstrators crowding around patients was "particularly frightening when the patient was on foot. We would be surrounded by people who were maniacal...in their fervor to get at this woman...It was getting very close, very physical. (Tr. 280-81) People arriving in cars are also terrified when they are "being mobbed by people on both sides of a car" and "many times they just plain don't get out of the car at all, and the people in the

car often are reduced to tears, because they are so frightened by who these people are that are surrounding their car." (Tr. 355) "Sidewalk counseling," according to witnesses, is "really an exercise in physical confrontation" (Tr. 290), which "all too often involve[s] pushing, shoving, grabbing, and in some cases fairly serious bodily contact between the patient and the sidewalk counselors." (Tr. 263-64) "Counselors" run "full tilt" to try to get at patients, shoving aside people and tripping, kneeing, or spitting on both the targeted patients and escorts. (Tr. 271, 290-92) One witness, accompanying a friend at Dr. Davis' office, was first trapped in her car and then crowded and screamed at throughout an entire parking lot by sidewalk counselors who ignored her repeated pleas to be left alone. She described the experience as "like being in the middle of a lynch mob." (Walker Tr. 31-32)

Notably, witnesses emphasized that the message yelled by sidewalk counselors has nothing to do with the terrors and dangers: "The content of the message is not even the issue. It's the sheer proximity of total strangers getting in your path...and shouting at [patients] and the whole thing is very frightening. [Women are] so frightened [when] it's a group of strange men who have suddenly come out of nowhere and surrounded them,... following them, badgering them." (Tr. 300) The particular risks to some women patients from being surrounded by unfamiliar men were dramatically illustrated by clinic counselor Susan Ward. She described a rape victim patient "accosted" by men out on the street who followed her after she asked to be left alone, and "when she did not want to accept brochures, they grabbed her arm and tried to tuck them under her sleeve." (Tr. 625) "She was terrified [and] the fact that she was touched...and that people tried to stop her from coming in, she required a good part of the day" to be calmed down enough to have surgery. (Tr. 614-15)

Not surprisingly, given this aggressive activity, witnesses relayed several incidents where physical violence erupted as a result of the excessive pursuit by sidewalk counselors, including after the TRO. (Tr. 272) In one incident, a sidewalk counselor at

Erie Medical Center assaulted an employee of the medical building and knocked her into a trash barrel. (Tr. 273-74) On another occasion at Erie Medical Center, a young woman getting out of her car was pushed by a sidewalk counselor, causing her to slip and fall on the ice and sprain her ankle. The patient's male companion became enraged, and started punching the sidewalk counselors. (Tr. 303, 397-98) Witnesses also described other actual or incipient fist-fights, because the persistent refusal of the "counselors" to leave people alone made the targets so angry that escorts had to pull them away to keep them from hitting the sidewalk counselors. (Tr. 180)

Witnesses underscored that "sidewalk counselors" rarely respect a target's request to be left alone, but rather walk right alongside, "brushing against them," "getting louder and louder." (Tr. 55-58, 60, 263) Once a target refuses the entreaties of sidewalk counselors, it becomes an "insistent and persistent sort of pursuit," stalking patients and "yelling" at them for "long distances, several hundred feet along the sidewalks or through parking lots. " (Tr. 263; *see also* JA 84-88, 95-98, 107-09, 116-17) The request of a target to be left alone is usually what escalates the encounter: When "the patients will not stop and talk to them, they get more and more frustrated and angry and their tones get louder and louder." (Tr. 60; Walker Tr. 31-32) Defendant Nancy Walker, a particularly abusive sidewalk counselor, acknowledged that virtually nothing would make her leave people alone (Walker Tr. 1087-88), and when people did ask her to leave them alone she screamed at them that "they had no right" to make her stop. (Walker Tr. 515, 559) Walker and other defendants would frequently continue their screaming right up to clinic doors, even using bullhorns right up against the glass. (Tr. 176)

Witnesses also testified that the TRO's prohibition of tortiously harassing patients, and its requirement that they let those who refuse "counseling" walk away, had almost no effect on the abusive aggression of sidewalk counselors. A couple of weeks

after the TRO, they soon returned to the previous levels of intensity and danger, and also regularly violated the two-person limit within the 15 foot zone. (Tr. 177-78, 271-72, 283-84, 347-48, 359-63, 540-42) Even when defendants were arrested for harassment, they were not deterred. (Tr. 422-27)

d. Evidence of Medical Risks from "Constructive Blockades" and Pursuit by "Sidewalk Counselors." Petitioners have never challenged the district court's findings, based on substantial and uncontradicted testimony, that their actions caused medical harm and disrupted the atmosphere necessary for safe health care. Witnesses described at length how patients are traumatized by their unwanted encounters with crowding demonstrators and invasive sidewalk counselors who refuse to leave them alone. Patients were described as infuriated, agitated, fearful, terrified by the demonstrators' cameras, tense, sobbing, and hysterical. (Tr. 487-91, 497-98, 500, 506, 616-17, 819-21, 828-29, 900, 990, 1003) The physical and emotional stress reactions to aggressive face-to-face encounters make it more difficult to prepare patients for surgery, and draw out the procedure because patients require extra time to calm down sufficiently. Moreover, when patients are extremely upset, they cannot hear and absorb crucial medical instructions. (Tr. 499, 609-10, 616-17, 819-21, 896-900) Frequently, patients are so agitated and stressed that they thrash around or tense up on the operating table, so that the sharp surgical instruments cannot safely be inserted. (Tr. 506-09, 610, 615-16, 821) The extreme stress produced by the invasive behavior of the anti-abortion protestors causes some patients to hyperventilate, dangerously elevates blood pressure, sends some asthmatic patients into respiratory arrest, and makes women with morning sickness start vomiting, risking dehydration. (Tr. 487-91, 506-09)

Witnesses recounted several patients so distraught from being accosted by sidewalk counselors and from being "hollered at in their face" that they could not safely undergo surgery. (Tr.

612-16) One patient was undergoing a two-day abortion procedure, which involves inserting a cervical dilation device, called a laminaria, on the first day. On that day, the patient encountered no protestors or sidewalk counselors, and she was calm and easily accepted the laminaria insertion. On the next day, however, she was badgered, crowded, and followed by sidewalk counselors, and was so upset that despite several attempts to calm her down, each time the doctor tried to insert the speculum she started thrashing about. If a laminaria is not promptly removed, severe infection or hemorrhage results. Consequently, this patient had to be rushed to a hospital and put under general anesthesia to complete the surgery. (Tr. 612-13) Other patients were so agitated they had to reschedule their surgery, which increases the medical risks because a later term abortion is a more complex and riskier surgical procedure. (Tr. 501-03, 896-98, 1003) When rescheduling is not a viable medical option or is not possible because the patient has traveled a great distance, the physician must try to overcome the extreme agitation by using general anesthesia, "which imposes an additional medical risk over a pregnancy termination." (Tr. 900-01) Some women are so distraught by their encounters with protestors that they refuse to come in for their post-surgical follow-up care, so they cannot be evaluated and treated for complications. (Tr. 737, 901-02)

Each of the witnesses emphasized that these adverse medical effects are due to the abuse from the anti-abortion protestors, and not from the anxiety of the surgery itself. They contrasted the relatively calm, alert state of patients on days when protestors are not present, with the distraught, thrashing women they had to attempt to treat on days when virulent protestors were present. (Tr. 492-93, 510-12, 618-19, 819-21, 900-02)

Abortion patients are not the only ones put at medical risk. Dr. Wortman testified that on Saturdays, when protestors are "always" there and his patients are "guarantee[d]...a certain amount of harassment," 60% of his patients are there for obstetrical or gynecological reasons other than abortion. (Tr. 899)

Dr. Alice Hoagland, a clinical psychologist whose office was in the same hospital as plaintiff Highland Obstetrical Group, described her psychiatric patients being accosted by anti-abortion demonstrators, and suffering treatment-hampering trauma from "being harassed, having proselytizing people around them, being yelled at,...having their pictures taken, not being able to walk in a direct line in order to get to their appointment, and feeling threatened." (Tr. 773-74, 733-35, 738-39, 741) For some patients, particularly cancer patients, the stress induced by entering this Rochester hospital through the gauntlet of abusive protestors created "life-threatening situation[s]." (Tr. 737)

Dr. Hoagland's testimony was particularly instructive about the physical risks of intrusively close encounters with strangers. An expert in how social stress influences medical treatment (Tr. 720-23), and "social impact theory," which pertains to the physical and psychological effects of having one's sense of personal space encroached (Tr. 743-51), Dr. Hoagland testified that exposure to a stressful or onerous situation surrounding medical care, such as being accosted by demonstrators, decreases the ability of patients to understand and comply with medical instructions, and also increases the likelihood of refusing to obtain follow-up care. (Tr. 724-25, 736) Dr. Hoagland also explained the actual physiological reactions to experiencing stress. Academic research establishes that people have an acute sense of personal space, which varies according to the setting of an encounter, the intimacy with the person encountered, and the perceived supportiveness. (Tr. 742-45) Intrusions by strangers into one's personal space is an extremely stressful situation. If one is already feeling anxiety or stress, as from upcoming surgery, and a stranger perceived as unsupportive intrudes too close, the preexisting psychological state is exacerbated, and there can be dramatic physical arousal. (Tr. 745, 789-90)

Stressful encounters, particularly just before surgery, can create an immunosuppressive response, which increases the risk of infection and post-surgical complications. (Tr. 740) The situation

presented by anti-abortion demonstrators was a "worst case scenario" for these risks, because of the demonstrators' loudness, unwelcomeness, hostility, and proximity in large numbers. (Tr. 744) Even two demonstrators coming very close, such as 5 feet away from a person, could be an extreme physical stress factor. A larger number of demonstrators as much as 25 feet away from a medical patient could also be a significant adverse stress factor, particularly if they are loud and perceived as hostile. (Tr. 748-51) Dr. Hoagland testified that increasing the physical distance by putting "a bubble" between loud intrusive people and their targets would alleviate the adverse physical and psychological stress effects. (Tr. 804) Defendants' tactic of pointing videocameras at patients exponentially elevates the stress, particularly for people seeking private, confidential treatment, such that even a single demonstrator 15 feet away presents a "medically intolerable" situation. (Tr. 751-53)

e. Modifications of the TRO Adopted in Preliminary Injunction to Respond to the Evidence. Faced with the evidence of the history of illegal blockades; vandalism; harassment; criminal convictions that did not deter defendants; substantial medical risk; continued blocking, impeding, crowding, and harassing patients and staff in defiance of the TRO; and the demonstrated ineffectiveness of local criminal law and the TRO in securing safe access to the targeted health care facilities, the district court entered a preliminary injunction that contained important modifications of the TRO. These modifications added most of the provisions Petitioners now challenge. The court noted that the new injunction was "more comprehensive in order to cover the full range of defendants' activities. [It] is better tailored to the evidence and addresses not only physical 'blockades,' but other 'rescue' activities as well....including: obstructing and impeding access...congregating in private driveways and parking lots, surrounding the cars of patients and staff as they try to enter the driveways and parking lots of the clinics, and crowding, shoving

or interfering with patients and staff as they approach the clinic on foot." 799 F. Supp. at 1433-34.

For these reasons the district court added in ¶1(b) a 15 foot buffer zone around driveway and doorway entrances, and a 15 foot clear zone around cars trying to enter or leave the facilities.[6] The court determined that 15 feet was the approximate length of a car, and thus its safe turning radius. (R. 13) These provisions were directly responsive to the fact that the TRO's general prohibition on blocking and impeding, and its prohibition on demonstrating within 15 feet of people seeking access, had not kept the driveways and doors clear, nor had it prevented pedestrians and vehicles from being surrounded, crowded, and impeded. The district court also noted that these "clear zones" are "necessary to ensure that people and vehicles seeking access to the clinics will be able to determine readily where the entrances are located [and] the clear zones will prevent defendants from crowding patients and invading their personal space." 799 F. Supp. at 1434.

While the preliminary injunction continued to allow two "sidewalk counselors" to enter these buffer zones and attempt face-to-face engagement, the court also added a clarification to sidewalk counselors' obligation in ¶1(c) to "cease and desist" when the targeted people verbally or non-verbally indicate that they do not want to be counseled. In response to the evidence that rebuffed sidewalk counselors continued to brush right up against their target and badger them, the order specified that when rejected "sidewalk counselors" must retreat to the 15 foot clear zone distance.

2. ***Proceedings in the Second Circuit***

Petitioners Schenck and Saunders appealed the preliminary injunction, and the Second Circuit panel unanimously upheld all

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[6] The full text of the preliminary injunction appears at 799 F. Supp. at 1440; 67 F.3d at 393; at Cert. Pet. App. A-33, and again at A-182.

but two provisions. By a 2-1 vote the panel struck down the 15 foot buffer zones in ¶1(b), and the requirement to "cease and desist" from unwanted "sidewalk counseling" in ¶1(c). *Pro-Choice Network v. Schenck*, 67 F.3d 359 (2d Cir. 1994). Plaintiffs sought rehearing *in banc* on these two provisions only, and by a 13-2 vote the entire Second Circuit vacated those portions of the panel decision and affirmed the entire preliminary injunction. *Pro-Choice Network v. Schenck*, 67 F.2d 377 (2d Cir. 1995) (*in banc*). Judge Oakes, writing the opinion of the court, thoroughly canvassed the factual findings and upheld the injunction in light of the facts and the *Madsen* requirement that injunctions restrict "no more speech than necessary" to serve significant governmental interests. Noting the factual similarities between this record and the *Madsen* record, *id.*at 388, the court held that the same significant governmental interests supporting the injunction approved in *Madsen* -- medical safety, public safety, and access to abortions -- were at stake here. *Id.* at 387. The court concluded that the buffer zones and "cease and desist" provisions were necessary to "provide a vulnerable group of medical patients with some relief from the duress caused by unwelcome physical proximity to an extremely vocal group of demonstrators." *Id.* at 391-92. They burdened no more speech than necessary because they allowed defendants complete expressive activities "in full view of people going into the clinic or just passing by," and they allowed "individualized face-to-face communication with persons entering the clinics," and did not restrict the message, but "only [defendants'] intimidating method of demonstration. *Id. at 389.*

SUMMARY OF ARGUMENT

This case starkly dramatizes the problems posed to law and order when a passionate mob is intent on preventing other people from exercising their constitutional rights, or intimidates and harasses them for doing so. Petitioners and their co-defendants engaged in a two year series of blockade sieges of plaintiff health

care facilities. When the criminal law failed to deter defendants and prevent imminent serious risks to health and public safety, the district court entered a TRO which exhorted defendants not to block or impede access to or egress from the medical institutions. But the TRO also proved insufficient to protect plaintiffs' facilities. Several defendants wilfully violated the TRO and faced contempt sanctions. In addition, the evidence showed that patients and staff continued to suffer obstruction, intimidation, and harassment. After hearing extensive evidence of this ongoing unlawful conduct, in a third attempt to secure order and protect the significant governmental interests jeopardized by defendants' campaign, the district court entered the challenged preliminary injunction. The injunction clearly is not a prior restraint.

The injunction's restrictions are content neutral, entered in response to defendants' proven unlawful conduct, and designed to provide medically vulnerable individuals with some modest breathing space to shield them from aggressive physical encounters. Under this Court's test in *Madsen v. Women's Health Center*, 114 S. Ct. 2516 (1994), the injunction burdens no more speech than necessary. The injunction leaves Petitioners free to express any message they wish to their targets; Petitioners merely must respect a modest clear zone of 15 feet around entrances, cars, and people. These clear zones correspond to the approximate length of a car and to the medically established zone of personal space necessary to reduce health-threatening physical stress. They are essential to secure significant governmental interests in ensuring safe and private conditions for medical care, and maintaining public safety and the free flow of traffic. These are the same governmental interests deemed sufficient in *Madsen* to support appropriately tailored injunctive relief.

The challenged injunction provisions are narrowly tailored to the record and burden no more speech than necessary to secure these governmental interests. The 15 foot clear zones and the requirement that "sidewalk counselors" must "cease and desist" from unwanted face-to-face targeting by backing away 15 feet

directly respond to defendants' proven conduct: congregating in driveways and across doorways, physically obstructing and visually obscuring them, risking vehicle accidents and physical injury; swarming around people as they attempt to enter the medical facilities, impeding, grabbing, brushing up against them, yelling in their face, and intimidating them to the point they have to forego or delay health care. This conduct regulated by the preliminary injunction is all independently proscribable as tortious or criminal harassment, assault, intentional infliction of emotional distress, or disorderly conduct. The clear zones and "cease and desist" requirement allow defendants to remain on the sidewalks adjacent to the targeted facilities, fully visible and audible to their targets and to passersby. Moreover, they afford Petitioners the opportunity to engage people face-to-face, so long as Petitioners do not abuse this opportunity by refusing to accept people's pleas to be left alone.

Indeed, the right to be let alone is central to this case. All citizens have a right, protected by the First Amendment, to refuse unwanted messengers, and to go about one's business without an unwelcome speaker dodging one's footsteps, shoving literature on one's body or grabbing and screaming. The evidence compellingly supports the district court's finding that defendants, with their aggressive and loud conduct, effectively hold people captive. Because Petitioners have no right to foist themselves on unwilling targets, the clear zones and "cease and desist" clause are essential to protect the right to be let alone.

Unfortunately, the modest restrictions in the preliminary injunction have proven insufficient for curbing Petitioners' unlawful and dangerous conduct. Defendants have again resorted to mass blockades, and their harassment campaign targeted at clinic staff and patients continues unabated. Because of many intervening events in the past four and one half years, the preliminary injunction has become stale. This Court should dismiss the writ as improvidently granted to enable the district court to fashion injunctive relief tailored to the current exigencies.

ARGUMENT

I. Under the Factual and Legal Framework of *Madsen*, the Challenged Portions of the Preliminary Injunction Must Be Affirmed.

This case bears a striking similarity to *Madsen v. Women's Health Center*, 114 S. Ct. 2516 (1994). It grows out of the same national campaign to disrupt abortion services, and its facts of ongoing obstructive tactics that endanger health care are notably evocative of those found sufficient to warrant a buffer zone in *Madsen*. Nevertheless, Petitioners continue to press several legal arguments rejected by this Court only two years ago. *Madsen* readily dispenses with these arguments.

A. *Madsen* Instructs That This Preliminary Injunction is Content Neutral and Not a Prior Restraint

Although *Madsen* rejected the argument that all injunctions that touch on First Amendment activity must be analyzed under the prior restraint doctrine, *id.* at 2524 n.2, Petitioners reassert that point here. Their argument, notably devoid of analysis of either the facts or the very limited nature of the injunctive restrictions, simply repeats the very claim rejected in *Madsen*.

As this Court noted, "[n]ot all injunctions which may incidentally affect expression ... are 'prior restraints.'" *Id.* Prior restraint analysis is inapplicable when the injunction is a remedial measure entered in response to prior or threatened imminent unlawful conduct, and when rather than preventing those enjoined from expressing their message altogether, it only limits the place and manner with a modest buffer zone. *Id. See also Lawson v. Murray*, 115 S. Ct. 2264 (1995) (Scalia, J., concurring with denial of writ of certiorari) (agreeing that injunctions issued as remedy for prior or threatened legal wrongs are not prior restraints).

Prior restraint analysis is particularly inapposite here. The preliminary injunction was a *subsequent* response to lawlessness; it was, in fact, the third attempt to preserve order, public safety, and medical safety. Initially, the state resorted to generally applicable criminal laws to attempt to punish and curb defendants' illegal actions. When this failed, and defendants again announced they would blockade, the court intervened. The TRO was the second level response to defendants' demonstrated propensity to violate legal norms. But, as the district court found, arrests and convictions had not deterred defendants, and unlawful activity such as obstructing ingress and egress to the plaintiffs' facilities, trespass, and crowding, grabbing, pushing, and intimidating patients and staff continued unabated after the TRO. 799 F. Supp. at 1424-25, 1434-35. Thus, when the TRO's attempt at prophylaxis also failed, truly the last line in defense of the rule of law was for the district court to order the modified restrictions in the preliminary injunction. In this situation, it would be dangerous for this Court to second-guess the district judge's well-informed assessment of the sort of restrictions necessary to prevent order and reduce medical risk.

Unlike the wholesale bans on publication or leafletting found to be prior restraints in *New York Times Co. v. United States*, 403 U.S. 713 (1971), and in *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971), the preliminary injunction here, like the order in *Madsen*, merely prevents Petitioners from congregating, obstructing, and harassing patients in a small 15 foot buffer zone, roughly the length of a car. Even more solicitous of Petitioners' expressive interests than the buffer zone in *Madsen*, it allows two "sidewalk counselors" to leaflet and converse face-to-face within the buffer zone, until their target refuses further unwanted communication. Upon such a refusal, they must only back away 15 feet, where they can continue a full range of expressive activity.

Madsen also establishes that this preliminary injunction is content neutral. Nothing in the order refers to the content of

Petitioners' message -- it is directed at their proven conduct of obstructing, impeding, crowding, badgering, and harassing. 799 F. Supp. at 1432-33. As one witness emphasized, the message is irrelevant to the distress caused; rather, "it's the sheer proximity of total strangers getting in your path and shouting." (Tr. 301) The injunction's aim is not to protect patients from offensive messages, but from documented, uncontradicted serious psychological and physical distress. 67 F.3d at 386; 799 F. Supp. at 1428, 1433-34.

B. The Identical Governmental Interests at Stake in *Madsen* Are Implicated Here.

In pressing their insupportable prior restraint argument, Petitioners disparage or ignore the governmental interests supporting this preliminary injunction. Pet. Br. 25-29. Yet the significant governmental interests supporting the challenged provisions track the interests deemed significant in *Madsen*. The courts below found that the government has a significant interest "in seeing to it that an abortion, like any other medical procedure, is performed under circumstances that insure maximum safety for the patient." 799 F. Supp. at 1433; 67 F.3d at 387 (quoting *Roe v. Wade*, 410 U.S. 113, 150 (1973)); *cf. Madsen*, 114 S. Ct. at 2526 (interest in protecting "not only the psychological, but the physical well-being" of patients). The injunction here, like that in *Madsen*, also "effectuates the significant governmental interest of public safety" and the free flow of vehicular and pedestrian traffic. 799 F. Supp. at 1433; 67 F.3d at 387; *accord Madsen*, 114 S. Ct. 2526. The lower courts also found the injunction necessary to ensure that women's constitutional right to seek abortion services was not "sacrificed in the interest of the constitutional rights of another" group. 799 F. Supp. at 1433; 67 F.3d at 387; *accord Madsen*, 114 S. Ct. at 2526 ("The State has a strong interest in protecting a woman's freedom to seek lawful medical or counseling services in connection with her pregnancy.").

Just as this Court in *Madsen* emphasized the strong

governmental interest in ensuring quiet and tranquility around medical facilities, 114 S.Ct. at 2528, the district court noted that "in crafting the preliminary injunction," it was "guided by the paramount need to maintain an atmosphere conducive to the health care function of plaintiffs' facilities. ... Defendants' noisy, disruptive, invasive, threatening and intimidating activities are clearly inappropriate in such a setting. The significant governmental interest inherent in providing safe medical care justifies certain carefully drawn restrictions on defendants' expressive activities." 799 F. Supp. at 1433. *See also NLRB v. Baptist Hosp., Inc.*, 442 U.S. 773, 783-84 n.12 (1979); *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 509 (1978); *Gregory v. Chicago*, 394 U.S. 111, 118 (1969) (Black, J., concurring) (government has power "to protect the public from the kind of boisterous and threatening conduct that disturbs the tranquility of buildings that require peace and quiet to carry out their functions, such as hospitals").

C. The Record Supporting the Injunction in This Case is Remarkably Similar to, and in Some Respects Stronger than the Record in *Madsen*.

The record supporting the current injunction is strikingly similar to the record deemed sufficient in *Madsen*. In some respects, such as adjudicated contempt violations and a history of criminal convictions and blockades, it is stronger. Here, as in that case, there was a prior order that proved insufficient, despite prohibiting blocking and impeding access, and tortious harassment. Witness after witness emphasized that after the TRO, defendants still regularly obstructed the driveways and doorways by congregating in them, and by crowding around cars and grabbing, pushing, and shoving people trying to enter or leave. The large numbers of demonstrators milling in and around the driveways either stopped or slowed cars, or so confused the drivers that they could not find the entrances and left the area. Demonstrators

crowded around patients and other pedestrians, including those seeking non-abortion medical care, "like a feeding frenzy" and "trapped them and forced them to listen." Tr. 282; 799 F. Supp. at 1423-27; *cf. Madsen*, 114 S. Ct. at 2521. Defendants admittedly also flouted the TRO's ban on trespass. *See* p.10, *supra*. The ban on tortious harassment was also routinely ignored, as defendants often screamed at, crowded, and continued to follow those hapless individuals who begged to be left alone. 799 F. Supp. at 1424-25.

The record of continuing unlawful behavior in this case is stronger than in *Madsen*. All defendants here, by their own admission, had been arrested and convicted for their illegal conduct at plaintiffs' health care facilities, yet were undeterred. Some defendants, including Petitioner Paul Schenck, were found by clear and convincing evidence to have wilfully violated the TRO's prohibitions on blocking and impeding, trespassing, and harassing. JA 144; R. 263. In contrast, there were no adjudicated contempt proceedings in *Madsen* before the Florida court added refined injunctive provisions.

The long history of mass blockades at plaintiffs' facilities also elevates this record above that in *Madsen*: While the plaintiffs here had been besieged by 18 "blockade" events over a two year period before the district court issued injunctive relief (JA 52-56), the *Madsen* defendants stipulated that they had never previously blockaded clinics in that area. *Madsen* R. 65, cited in Brief Amicus Curiae of the United States of America submitted in *Madsen v. Women's Health Center* at 3. Moreover, the type of obstructive activity that prompted the state judge in *Madsen* to fashion the buffer zone restriction upheld by this Court appears, from the description in that record, to have constituted what the district court here characterized as "constructive blockades." The actions that led to the modified Florida injunction consisted of large numbers of protestors crowding the street, "mov[ing] in a steady stream across the Clinic driveway [where] [t]heir presence caused cars entering the clinic property to slow or stop entirely. As the cars slowed, a cadre of protestors swarmed around them,

shoving literature into the cars' windows and, pressing close to the cars, screaming invective." Brief for Respondents in *Madsen* at 4 (citing *Madsen* JA 265, 266, 542); 114 S. Ct. at 2521; *cf.* 799 F. Supp. at 1424-25 (description of "constructive blockade" activity).

D. *Madsen* Does Not Require Failure of a Prior Less Restrictive Injunction, Even Though That is Precisely the Situation in This Case.

Petitioners incorrectly contend that *Madsen* mandates that no injunctive speech restrictions can pass First Amendment scrutiny unless the court, in response to pervasive illegal conduct, first imposed narrower prohibitions that failed to protect the governmental interests. (Pet. Br. 30) This argument is unavailing here. The district court did enter a less restrictive TRO in response to evidence of persistent prior unlawful conduct and defendants' announced intention imminently to engage in another illegal blockade. Defendants then admitted their past illegal behavior, agreed to the continuation of the TRO, and further stipulated that blocking, impeding, and obstructing access and egress could be enjoined. Despite their stipulation, they -- and Petitioner Schenck especially -- continued to engage in this very conduct. Petitioners have no grounds now to complain about the justification for the original or subsequent restrictions on their conduct.

Petitioners misread *Madsen* when they assert that it mandates initial resort to a non-speech restrictive injunction, no matter what the evidence of criminal and tortious obstructive and harassing conduct and irreparable injury before the court. *Madsen* simply enumerated that the failure of an initial order "to accomplish its purpose" was one factor that "*may* be taken into consideration in evaluating the constitutionality of the broader order." 114 S. Ct. at 2527 (emphasis added). It would be dangerously unwise to elevate this factor to a litmus test. Judges must retain flexible equity powers to respond to the full range of evidence before them, to proscribe not only the "precise conduct

previously pursued," but "to eliminate its consequences" and demonstrated harms. *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 697-98 (1978).

For example, if a district court hears evidence of the caliber presented in this case, that demonstrators congregating near a driveway obstruct it from view and make it more dangerous for cars to try to enter, that court should be able to fashion a modest clear zone in order to clear the entrance both visually as well as physically. To bind a district court's hands with a rule that all it can do when it knows that a clear zone is necessary to secure safe access is wait for the inevitable failure of a less restrictive injunction "would be a wastefully iterative and risky exercise." 67 F.3d at 375 (Oakes, J. dissenting). Similarly, a district court should have flexibility to fashion a limited bubble around people when presented with evidence that protestors are persistently invading personal space in an intimidating and dangerous manner. It is particularly important to preserve flexibility in the health care context, where conduct other than physically blocking and trespassing can disturb the non-threatening atmosphere essential for reducing medical risks. "While the district judge waits for the injunction to prove ineffective, patients may well continue to suffer the extreme stress and anxiety that causes the increased health risks." *Id. See also NLRB v. Baptist Hosp. Inc.*, 442 U.S. 773, 783-84 (1979); *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 505-07 (1978) (upholding initial resort to complete bans on union leafletting in areas where patients gather); *Frye v. District 1199, Health Care & Soc. Servs. Union*, 996 F.2d 141 (6th Cir. 1993) (initial injunction with 25 foot buffer zone around nursing home driveways plus limits on number of picketers and hours for picketing necessitated by healthcare interests).

II. The First Amendment Grants No Privilege To Invade Personal Space and Force One's Invasively Close Physical Presence on Unwilling Targeted Individuals.

In assessing whether the challenged injunction provisions "burden no more speech than necessary" to protect significant government interests, this Court must keep in mind two important First Amendment principles: 1) "the right of every person to be let alone must be placed in the scales with the right of others to communicate," *Rowan v. United States Post Office Dep't*, 397 U.S. 728, 736 (1970); and 2) face-to-face importuning and picketing focused on vulnerable individuals who cannot easily avoid it present risks of duress and coercion that may appropriately be regulated. *Madsen*, 114 S.Ct. at 2527, 2529; *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 684 (1992); *Frisby v. Schultz*, 487 U.S. 474, 486 (1988). The right to be let alone and to refuse unwanted messengers is of equal First Amendment importance to the right to speak because both flow from the interest in personal autonomy and freedom of thought. *Public Util. Comm'n v. Pollack*, 343 U.S. 451, 468 (1952) (Douglas, J., dissenting) ("To think as one chooses, to believe as one wishes are important aspects of the constitutional right to be let alone.").[7]

The First Amendment principle at stake is not, as Petitioners insist, whether speech can be completely banned on a public sidewalk. The 15 foot buffer and bubble zones and the "cease and desist" requirement neither remove Petitioners from the sidewalks adjacent to the health care institutions nor curtail their vigorous sidewalk protest; they merely limit Petitioners' proven tortious conduct of impeding entrances, invasively crowding and

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[7] These rights also rest on interests in repose and tranquility, privacy, and avoiding emotional and physical distress. *Frisby*, 487 U.S. at 477, 484-85; Marcy Strauss, *Redefining the Captive Audience Doctrine*, 19 Hastings Const. L. Q. 85 (1991). *See also* Anne D. Lederman, *Free Choice and the First Amendment: Or, Would You Read This If I Held It In Your Face and Refused to Leave*, 45 Case Western L. Rev. 1287 (1995); Franklyn S. Haiman, *Speech v. Privacy: Is There a Right Not To Be Spoken To?*, 67 NW. U. L. Rev. 153 (1972).

stalking people, and physically and mentally badgering those who have rejected their "counseling." As the district court found, defendants' unbridled conduct threatened to overwhelm patients' countervailing constitutional rights to obtain legal medical services, and their First Amendment right to reject unwanted speakers. 799 F. Supp. at 1433, 1435-36. Thus, the question here is whether an invasive "in your face" manner of protest directed at medically vulnerable people at health care locations, whose well-being requires a calm, stress-free atmosphere, can be regulated by narrowly tailored zones that preserve personal space and clear entrances.

As Petitioners acknowledged in the court below, their entire position rests on an insistence that they have a right to "speak in somebody's face [even] once that person has said go away." Second Circuit *In banc* Oral Argument Tr. at 13. This proposition has consistently been rejected in First Amendment jurisprudence. The First Amendment does not guarantee the right to communicate one's view to anyone at all times and in any manner. *Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981). As this Court has often emphasized, "[n]othing in the Constitution compels us to listen to or view any unwanted communication," and there is no "right to press even a 'good' idea on an unwilling recipient." *Rowan*, 397 U.S. at 737-38; *Frisby*, 487 U.S. at 485. The venerable First Amendment right to distribute literature extends only to those "willing to receive it." *Schneider v. State*, 308 U.S. 147, 162 (1939). Nor can speakers "insert a foot in the door and insist on a hearing," *Kovacs v. Cooper*, 336 U.S. 77, 86 (1949), or "cordon off [an] entrance to a public or private building ... and allow no one to pass who [does] not listen to their exhortations." *Adderley v. Florida*, 385 U.S. 39, 48 n.7 (1967); *Cox v. Louisiana*, 379 U.S. 555 (1965).

The need to protect the right to be let alone is particularly compelling under the factual circumstances here. Defendants persistently intrude into personal space of people entering health

care facilities in an obstructive, intimidating, and physically risky manner. *Cf.* Findings at Schenck contempt trial (blocked car and insisted occupants take literature, JA 131, and stood across doorway so no one could pass without encountering him, JA 129-30); findings at Walker contempt trial (crowded around vehicle and made it difficult for occupants to exit until they took literature, JA 84; with "loud and invasive behavior" kept yelling at people or closely following and brushing up against them, despite requests to leave them alone, until one targeted women "broke down into tears and started to sob." JA 84, 86-89); findings at Behn/Rainero contempt trial (pursued young woman, forcing speech and video camera on her, ignored her pleas to be left alone, to the point she "became increasingly upset and began crying, whimpering and shaking." JA 108-09). When defendants stalk and harangue patients, ignore their requests to be left alone, and terrify them by zeroing in with videocameras, 799 F. Supp. at 1424-26, "substantial privacy interests are being invaded in an essentially [and medically] intolerable manner," *Cohen v. California*, 403 U.S. 15, 21 (1971). *See* testimony of Dr. Hoagland, Tr. 751-52. *Cf. New York State NOW v. Terry*, 886 F.2d 1339, 1343 (2d Cir. 1989), *cert. denied*, 495 U.S. 947 (1990) (There is no First Amendment right to demonstrate "in close proximity to individual women entering or leaving clinics so as to tortiously harass them or to invade another's personal space.") Thus, the government's interest in securing the First Amendment right to be let alone and to refuse unwanted speakers provides additional support for the challenged provisions.

The preliminary injunction fully secures Petitioners' First Amendment right to attempt to engage with their desired targets and to approach them in a non-threatening manner at particular sites. But Petitioners have no right to abuse the privilege of targeted protest, as they have done here, and turn it into an instrument for intimidating and inflicting psychological and physical harm on vulnerable medical patients. Indeed, the facts of this case starkly illustrate why this Court has frequently expressed

concern that targeted protest and face-to-face encounters present risks of duress and coercion. *Madsen*, 114 S. Ct. at 2527, 2529; *Lee*, 505 U.S. at 683-85; *Frisby*, 487 U.S. at 486.[8] As Justice Stevens noted in *Frisby*, when picketers engage in such conduct, they are "obviously intend[ing] to do more than convey a message [they are] intend[ing] to cause substantial psychological distress." *Id.* at 498 (Stevens, J., dissenting.)

When targeted protest turns into invading others' personal space by walking beside and brushing up against them, following or surrounding them and foisting proximity, unwelcome messages, and frightening, privacy-invading video cameras on people begging to be left alone, all pretense to advancing the marketplace of ideas breaks down. Such conduct is pure intimidation, coercion, and harassment. "[T]here is no right to invade the personal space of individuals going about their lawful business, to dog their footsteps or chase them down a street, to scream or gesticulate in their faces, or to do anything else that cannot be fairly described as an attempt at peaceful persuasion." 67 F.3d at 396 (Winter, J., concurring). This conduct is independently proscribable as tortious or criminal assault, harassment, disorderly conduct, and intentional infliction of emotional distress. *See, e.g., Galella v. Onassis*, 487 F.2d 986 (2d Cir. 1973) (shadowing and photographing Jackie Onassis and her children without their consent constitutes tortious

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[8] In *Lee*, these risks, plus littering, pedestrian congestion, and the possibility that unwanted encounters with "harried or hurried travelers[s]" could cause delay in catching planes, were sufficient, in the view of four members of this Court, to sustain a *total* ban on leafletting in airports, even when "a busy passenger ... [could] fend off a leafletter with minimum disruption to himself." 505 U.S. at 831-32 (Rehnquist, C.J., White, J., Scalia, J., and Thomas, J., dissenting). Thus, surely in this case, where unwanted encounters risk delayed surgery and elevated health risks, the limited buffer between patients and demonstrators, which permits two defendants to attempt face-to-face leafletting until rebuffed, and does not ban picketing at the chosen site, is sufficiently tailored to protect First Amendment interests.

and criminal harassment under N.Y. law and thus not protected by First Amendment); *City of Fargo v. Brennan*, 543 N.W.2d 240, 244 (N.D. 1996) (aggressively invading zone of personal space and waving arms at targeted person is physically intimidating, threatening and unprotected criminal conduct); *People v. Calvert*, 629 N.E.2d 1154, 1158-59 (Ill. App. 1994) (criminal harassment and assault for cornering individual and verbally abusing her, screaming in her face and jabbing finger at her); *Van Duyn v. Smith*, 527 N.E.2d 1005 (Ill. App. 1988) (tort of intentional infliction of emotional distress found based on facts very similar to present case), *cert. denied*, 492 U.S. 906 (1989); *People v. Blackwood*, 476 N.E.2d 742, 746 (Ill. App. 1985) (man prosecuted for violating domestic violence protective order when he came invasively close to wife and yelled epithets at her; court holds this form of expression "not subject to constitutional protection under any circumstances"); *State v. Lilburn*, 875 P.2d 1036 (Mont. 1994), *cert. denied*, 115 S. Ct. 726 (1995) (rejecting First Amendment challenge to harassment conviction for impeding and interfering with hunter); *Flamm v. Van Nierop*, 291 N.Y.S.2d 189 (Sup. Ct. 1968) (torts of assault and intentional infliction of emotional distress from stalking plaintiff by driving behind him at dangerously close range, walking closely behind or beside him in public while grimacing and leering at him).

Dr. Hoagland's expert medical testimony in this case, documenting the physical and psychological basis for a safe zone of personal space, *see* pp.17-18 *supra*, highlights the importance of this Court's recognition of the need to shield people from intrusively close targeted protest. This testimony is supported by a growing body of social science research which establishes that the comfortable zone of personal space for interactions among strangers in public is 8 to 12 feet or more, depending on numbers, loudness, and perceived unfriendliness. Violations of this social distance cause physiological arousal, a "fight or flight" reaction, anxiety, and stress. These negative effects are exacerbated the closer the distance and the more negative the encounter, and when

retreat or escape is not readily feasible.[9] In the case of anti-abortion protestors, empirical research documents that the stress from unwelcome encounters increases patients' post-surgical depression, but that a buffer of clinic escorts insulating patients from direct contact can moderate the distress. Catherine Cozzarelli & Brenda Major, *The Effects of Anti-Abortion Demonstrators and Pro-Choice Escorts on Women's Psychological Responses to Abortion*, 13 J. Soc. & Clinical Psychol. 404 (1994) (studying patients at plaintiff Womenservices).

III. Each of the Challenged Injunction Provisions Are Pinpointed to the Record, Burden Minimal Amounts of Protected Speech, and Are Essential to Protect Proven Threats to Significant Governmental Interests.

Based on the foregoing principles, this Court has frequently upheld some physical separation between protestors and their targets -- often with buffer zones greater than the modest 15 foot ones here -- in order to reduce the potentially intrusive or coercive effects of targeted demonstrations, and to protect privacy and autonomy of thought. *Madsen*, 114 S. Ct. at 2526-27 (ban on "sidewalk counseling" encounters and other demonstrating within 36 feet of clinic entrances necessary to protect physical and psychological well-being of those "captive to medical

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[9] *See, e.g.*, Marianne LaFrance & Clara Mayo, Moving Bodies: Nonverbal Communication in Social Relationships 68-69, 83-91, 108-11 (1978); Edward T. Hall, *The Effects of Personal Space and Territory on Human Communication, in* Nonverbal Communication in Human Interaction 114-31 (Mark L. Knapp, ed. 1978); Leslie A. Hayduk, *Personal Space: Where We Now Stand* 94 Psychol. Bull. 293 (1983); Warren M. Hern, *Proxemics: The Application of Theory to Conflict Arising From Antiabortion Demonstrations*, 12 Population & Environ. 379 (1991) *See generally* Brief Amicus Curiae of American College of Obstetricians & Gynecologists, National Abortion Federation, and Planned Parenthood Fed. of America, Inc. in Support of Respondents.

circumstance"); *Burson v. Freeman*, 504 U.S. 191 (1992) (100 foot buffer zone around voting sites necessary to serve governmental interest in protecting citizens' freedom of choice in exercising franchise); *Cox v. Louisiana*, 379 U.S. 555 (1965) (demonstrations near courthouses can be curtailed because of appearance of coercive effect on judicial process);[10] *Boos v. Barry*, 485 U.S. 312 (1988) (upholding prohibition on three or more people congregating within 500 feet of foreign embassies because of risk of intrusion on and coercion of diplomats). The challenged injunction provisions here protect the same interests in the right to be let alone from coercive targeted encounters, and, as detailed below, "burden no more speech than necessary."

A. The Fixed 15 Foot Buffer Zones Around Driveways and Doorways. The district court found that this "clear zone" in ¶1(b) was necessary "to ensure that people and vehicles seeking access to the clinics will not be impeded, and will be able to determine readily where the entrances are located." 799 F. Supp. at 1434. Like the 36 foot buffer zone upheld in *Madsen*, it directly promotes the governmental interests in protecting unfettered ingress and egress, and guarding public safety and the free flow of traffic. 114 S. Ct. at 2527. It was added to the preliminary injunction because ingress and egress remained physically and visually obstructed despite the TRO's prohibition on blocking and impeding. Given the record of dangers caused by confused drivers trying to squeeze into narrow, obscured driveways, and of people

[10] *Cf.* 18 U.S.C. §1507, making it a crime punishable by up to one year's imprisonment to demonstrate near federal courthouses or places of business or residence of judges with intent to influence judges, witnesses, or court personnel. This statute leave little doubt that if Petitioners engaged in the conduct they targeted at clinics on the sidewalks or step of this Court, they would have been criminally prosecuted. *See also United States v. Grace*, 461 U.S. 171, 182 (1983) (impermissible for demonstrators to obstruct sidewalks or access to Supreme Court building and grounds).

unable to find the entrances or grabbed at, crowded, and intimidated by the demonstrators, the district court had no alternative other than to establish a clear zone.

The 15 foot zone is "pin-pointed" to its objective. *Carroll v. President & Comm'rs of Princess Anne*, 393 U.S. 175, 183 (1968). It applies only to the places where people must traverse to gain access, *cf. Madsen*, 114 S. Ct. at 2528 (striking down buffer zone around side and back of building where people do not enter), and its distance, which is the length of an average car, is based on the safe turning radius and amount of visual space a driver needs while turning. (R. 13) It also reflects the amount of personal space people need to proceed in public without feeling stressed and intimidated. *See* pp.17-18, *supra*. Petitioners' contention that the fixed buffer zones are not sufficiently tailored because they are not site specific, (Pet. Br. 48) is meritless.[11] The length of a car and the necessary safe zone of public personal space do not vary from site to site, and the 15 foot buffer is easily applied at each facility.

The fixed 15 foot zone burdens a minimal amount of speech. Picketing that "obstructs or unreasonably interferes with ingress or egress" is not protected speech, *Cameron v. Johnson*, 390 U.S. 611, 617 (1968), and this record shows that by congregating in or near entrances defendants did unreasonably and intentionally impede and obstruct access. 799 F. Supp. at 1424. Outside the modest zone of 15 feet, Petitioners can continue to speak, pray, chant, leaflet, picket, and communicate with their targets. As the court below noted, the buffers do not hamper defendants' message, "only [their] intimidating method of demonstration." 67 F.3d at 389. Unlike the 36 foot buffer zone approved in *Madsen*, which pushed protestors across the street, the 15 foot buffer zone permits demonstrators to remain on the

[11] Petitioners have never previously objected to the lack of site specificity during the six years of this litigation. In fact, when *plaintiffs* sought some site specific modifications, (R. 454) defendants objected, arguing that it would be too confusing. (Hearing of 11/4/94)

adjacent sidewalks at all plaintiffs' facilities, *see* site plans lodged by Respondents with this Court, fully visible and audible to cars and pedestrians. Moreover, unlike the absolute, impermeable, buffer zone upheld in *Madsen*, this buffer permits two sidewalk counselors within its ambit.[12]

B. The 15 Foot Bubble Around Vehicles. Like the fixed zone around entrances, the 15 foot clear zone around vehicles is precisely tailored to the length and safe driving space for the average car. It is directly responsive to evidence that defendants swarmed around cars as they tried to proceed towards driveways, or played a "game" of "dare you to hit me" with drivers, or surrounded cars once they had parked, impeding the occupants' ability to get out. *See* pp. 8-9, *supra*. It, too, was added to the preliminary injunction when the evidence showed this conduct continuing unabated despite the TRO. Contrary to Petitioners' assertion, the fact that this bubble zone "floats" does not belie its narrow tailoring. Because cars move, the protective clear zone has to move with them.

The vehicle bubble protects governmental interests in public safety and traffic flow, and does no more than necessary to secure these interests. While the same objective could be accomplished by prohibiting congregating in the streets, the 15 foot bubble around cars is less restrictive because it leaves defendants free to stand in streets, which they occasionally do. The vehicle bubble also is necessitated by the governmental

[12] Petitioners' contention that the buffer zones are unconstitutionally "vague" due to use of the term "demonstrating" must be rejected. This term, which encompasses all of defendants' activities, is commonly used in injunctions regulating the manner of potentially disruptive and coercive protest. For example, the buffer zone provision upheld in *Madsen* used the term "demonstrating." 114 S. Ct. at 2522. This widely employed term is capable of being understood by people of ordinary intelligence, *see Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

interest in medical safety. 67 F.3d at 389. Hostile strangers crowding up to a car, making the occupants feel trapped, is a particularly frightening, stress-inducing experience. (Tr. 355-56) The bubble also furthers the governmental interest in protecting the right to be let alone. When defendants congregate around a car, leaving it no clear space to proceed, the occupants are literally captive, and cannot escape without risking hitting their tormentors. (Tr. 519)

The protective bubble around cars burdens no more speech than the fixed buffer zones. "Sidewalk counselors" are able to approach to try to give literature to people in the cars, and the 15 foot distance leaves other protestors and their signs entirely visible and audible to drivers.

C. The 15-Foot Bubble Around Pedestrians. The evidence demonstrates that the 15 foot bubble around pedestrians is essential to maintain a safe zone of personal space around those people who must enter the clinics on foot, rather than in cars.[13] While trying to proceed on foot through the crowds, without the protective shell of a vehicle, patients are at their most vulnerable. Testimony showed that defendants grabbed at people, elbowed and shoved them, thrust literature on their bodies, impeded their progress down sidewalks or through parking lots, and yelled in their face. Moreover, even though defense witnesses acknowledged that a close encounter with more than two strangers would be very intimidating, as many as four or five demonstrators often encircled patients, brushing and bumping against them. *See* p. 12, *supra*.

[13] In *Madsen*, where the evidence was that all patients arrived by car, there apparently was no need for a bubble around pedestrians. The 36 foot absolute buffer zone, which kept all demonstrators, even "sidewalk counselors," across the street from the vehicle entrance points, was sufficient to protect the governmental interests. Here, in contrast, where the fixed buffer zone does not push demonstrators across the street, and where patients often arrive on foot, only a modest bubble around pedestrians fully secures the interests at stake.

While the First Amendment requires metaphoric "breathing space" for the exercise of expressive rights, *Boos v. Barry*, 485 U.S. at 322, it also surely allows literal breathing space for medically vulnerable individuals and health care providers targeted by demonstrators proven to act in a loud, intimidating, invasive fashion.

This protective zone's distance is pinpointed to the medical expert testimony that 15 feet is the amount of personal space necessary in this health care context to reduce psychological stress, privacy invasion, and the concomitant medical risks. Indeed, based on the testimony, the district judge would have been warranted in ordering a larger zone, as Dr. Hoagland testified that a large number of demonstrators 25 feet away from a medical patient could augment stress when, as here, they are perceived as loud and hostile. (Tr. 748-51) *Cf. Galella*, 487 F.2d 986 (paparazzo photographer required to stay 25 feet away from Jackie Onassis and her children).

The 15 foot bubble around pedestrians is of utmost importance for the governmental interest in medical safety and privacy. As the court below noted, patients entering and leaving the clinics before and after surgery are in a medically vulnerable state, and need to be protected from running a gauntlet of intimidating and stress-inducing demonstrators. 67 F.3d at 389-90. This Court emphasized in *Madsen* that picketing targeted at patients "threatens not only the psychological, but the physical well-being of the patient held 'captive' by medical circumstance." 114 S.Ct. at 2526. The district court here found that defendants intentionally target for harassment "young women who are already undergoing the stressful situation of terminating an unwanted pregnancy." 799 F. Supp. at 1428. Thus, the bubble around people, which serves to alleviate stress and the invasive effects of defendants' cameras, is necessary to protect the governmental interest in ensuring that targeted protests do not become instruments of duress and coercion. *Frisby*, 487 U.S. at 486-87.

The pedestrian bubble also promotes public safety and

unfettered ingress and egress. When pedestrians are surrounded, intimidated, or impeded in their ability to walk down the sidewalk, they do not have unobstructed access. If a court can establish clear zones around the points of entry, *Madsen*, 114 S.Ct. at 2526-28, then surely a court can also provide limited protection for people to proceed towards those entryways, when they are most vulnerably exposed. For example, if a governmental official or judge were giving a speech that was threatened with disruption by protestors, just as law enforcement could prevent people from coming too close to the assembly hall entrance, they could also cordon off a clear zone around the targeted dignitary, both to ensure access and to protect the judge's safety and mental tranquility. It would be foolish and dangerous to hold that all the law can do in this instance, or in the context of patients trying to obtain medical care, is keep the entranceways clear, but not maintain safe space around the trapped target of the protest.

Like the other clear zones, the pedestrian bubble burdens no more speech than necessary to preserve a safe, stress-reducing zone of personal space. By regulating only defendants' physical proximity to a vulnerable group of patients it preserves the right to approach for "sidewalk counseling" and allows defendants to engage in a complete range of expressive activities from only 15 feet away, leaving them completely audible and visible to their targets. Petitioners' contention, Pet. Br. 48-49, that the bubble silences their speech on the sidewalk is plainly wrong. So long as they do not invade the 15 foot bubble, there is nothing they cannot do or say on the adjacent sidewalks, except make excessive noise and impede. And, like the bubble around moving cars, the pedestrian bubble must "float" along with moving people to ensure unmolested access to hospitals and clinics. There is no evidence that the "floating" nature of the bubble has ever been used to push defendants off the sidewalk; defendants' targets are far too desperate to get where they are going without interference to try to chase defendants away. Contrary to Petitioners' contention, Pet. Br. 49, the only "bulldozing" here has been by defendants, who

have rolled over the rights of others.[14]

D. The Requirement that "Sidewalk Counselors" Cease and Desist and Back Off 15 Feet from Unwilling Targets.

Petitioners' principal objection to the requirement in ¶1(c) that they stop face-to-face "counseling" of those who have rejected it and back away 15 feet is the misplaced contention that it is indistinguishable from the "no approach" provision struck down in *Madsen*. The "cease and desist" or "right to walk away" clause rests on a significant distinction. While *Madsen's* "no approach" requirement prohibited all uninvited approaches, ¶1(c) of the present injunction specifically *permits all uninvited approaches*. As the court below explained, the demonstrators "may approach without being invited and need not retreat unless expressly rejected by a counselee, and then only to a distance of 15 feet." 67 F.3d at 390-91. Thus, the "cease and desist" clause is much more narrowly pinpointed to the objective of protecting the right to be let alone. Whereas the "no approach" provision made it more difficult for demonstrators to reach prospective listeners, the present injunction protects only *unwilling* listeners from forced proximity to the unwanted messenger and from being stalked at very close range. Those who are willing to engage with the demonstrators have the unfettered right to do so.

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[14] Petitioners also object that they do not know the extent of the floating zone. The district court has already clarified that all the injunction's provisions apply at the clinics themselves. (JA 29) Thus, as Petitioners acknowledged below, the district court's clarification confines the injunction to the immediate sites of the clinics while people are in the act of trying to get in or out. (Panel oral argument) Respondents would have no objection to more precise geographical boundaries -- *e.g.* to the public transit stop one block away from Womenservices, or to the end of a particular block. Indeed, Respondents asked the district court for such site specific modifications at the new location of Womenservices. The district court, which is familiar with the sites and the record, is the proper forum to make such modifications.

When Petitioners argue that targets have no right to "disinvite" them, Pet. Br. 36, or to "veto" them by saying no and trying to walk away, Pet. Br. 38, they are again insisting that they can force themselves on unwilling listeners, get in people's face and stay there. There is, of course, no such right under the First Amendment. *See* Part II, supra. In denying that people have the right to be left alone, Petitioners invoke the First Amendment in vain. They would turn it into a license to trample on others' autonomy and intimidate those who disagree with them. Petitioners also turn upside down the notion of an "audience veto," which applies when some audience members try to disrupt a speaker so that others who want to hear cannot do so. Here, in contrast, each targeted person makes up her own mind whether to listen or to walk away. Her "veto" neither inhibits other listeners nor "vetoes" the speakers' right to address willing recipients any more than does walking out on a speech, or saying "no thanks" to a handbiller. Indeed, a target's refusal does not even shield her from the message, because the rebuffed "counselor" can continue saying anything he wants from 15 feet away.

In light of the evidence that "sidewalk counselors" routinely refuse to respect people's wishes to be left alone, the "cease and desist" provision is essential to secure the governmental interest in protecting the privacy and personal space of unwilling listeners. It also ensures safe conditions for medical care, as highlighted in testimony about how the unwanted encounters made patients so distraught they faced increased risks from surgery. The "cease and desist" clause also advances the governmental interest in public safety, because persistence by unwanted "sidewalk counselors" often leads to aggressive physical encounters -- "counselors" grabbing, shoving, elbowing, tripping, and knocking down people, and punches thrown by people angry that the "counselors" won't leave them alone. *See* pp. 13-14, *supra*. *Cf. Chaplinsky v. New Hampshire*, 315 U.S. 568, 573 (1942) ("face-to-face words likely to cause a breach of the peace" are "fighting words" unprotected by First Amendment).

Faced with the aggressive refusal of "counselors" to leave people alone, the district court concluded that the "cease and desist" provision is necessary to protect vulnerable patients from becoming unwilling "captives":

> The evidence ... clearly shows that, even when women seeking access to the clinics signal their desire to be left alone, defendants continue to follow right alongside them and persist in communicating their message. It is obvious, therefore, that women ... cannot, as a practical matter, escape defendants' message. Defendants' aggressive conduct makes it impossible for women entering the clinics simply to avert their eyes or cover their ears in order to avoid receiving defendants' message. The only choice women have if they want to avoid the message is to forego their constitutional right to have an abortion. Thus, women entering plaintiffs' clinics are a "captive audience" for defendants' message and the "cease and desist" provision of the injunction is warranted.

799 F. Supp. at 1436.

Although they do not challenge these factual findings, Petitioners nonetheless dispute that the "captive audience" principle can apply on a public sidewalk. It is, they contend, limited to the home. Pet. Br. 41-44. Their argument is flawed for two reasons. First, as the district court found, it is Petitioners' own "aggressive conduct" that makes the principle applicable here. Secondly, this Court has never limited the doctrine to the home, as *Madsen* itself demonstrates in noting that the patients were "held 'captive' by medical circumstance." 114 S. Ct. at 2526. *See, FCC v. Pacifica Found.*, 438 U.S. 726, 730 (1978) (family in car); *Lehman v. City of Shaker Heights*, 418 U.S. 298, 307 (1974) (public transit commuters); *Kovacs v. Cooper*, 336 U.S. 77, 86-87 (1949) (people *on streets* or at home bombarded by sound trucks)

(emphasis added).

In balancing the speaker's right to communicate against the listener's right to be let alone, this Court has applied the captive audience doctrine when: 1) a strong privacy interest is implicated, *see, e.g., Frisby*, 487 U.S. at 484 (residential privacy); and 2) the target cannot practically avoid unwanted communication, *see, e.g., Lehman*, 418 U.S. at 307 (Douglas, J., concurring); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209 (1975) (doctrine applies when "degree of captivity makes it impractical for the unwilling auditor to avoid exposure"); and 3) less intrusive alternatives for communication are afforded the speaker, *see e.g., Frisby*, 487 U.S. at 483; *Pacifica* 438 U.S. at 750.

These reasons obtain here. First, women seeking access to hospitals and clinics are exercising their constitutionally protected right to abortion. *See Planned Parenthood v. Casey*, 505 U.S. 833 (1992). As a constitutional right, the medical privacy interest here is even stronger than the residential privacy interest recognized in *Frisby*. *Accord Madsen*, 114 S. Ct. at 2526; *see also, Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 766 (1986) ("The decision to terminate a pregnancy is an intensely private one that must be protected in a way that assures anonymity."). Moreover, defendants' targeted harassment of vulnerable medical patients invades these "substantial privacy interests in an essentially intolerable manner." *Cohen v. California*, 403 U.S. 15, 21 (1971).

Second, as the district court found, women seeking access to hospitals and clinics have no practical means of avoiding unwanted communication. The usual remedies -- avert one's eyes, or walk away -- are nullified by defendants' conduct. When yelling "sidewalk counselors" walk alongside their targets, they are literally like the blaring soundtrucks in *Kovacs*. Indeed, here it is much more difficult to escape the verbal and physical harassment than it was for the bus commuters in *Lehman*, who could simply turn away by reading a book or looking out the window, or the father in *Pacifica*, who could turn off the radio.

Finally, the "cease and desist" provision is couched in the narrowest terms to achieve the governmental objective, and burdens little, if any protected speech. It places no restriction on "sidewalk counselors" until a target refuses them, and then it merely requires the "counselor" to respect the requisite zone of personal space by backing away 15 feet so that the targets are no longer "captive" and free to continue to their destination. Contrary to Petitioners' contention, "sidewalk counselors" are not muzzled; once 15 feet away, the counselor "may continue advocating his or her beliefs to the woman who has refused them ... [and] remains free, as well, of course, to approach anyone else to attempt to 'counsel' them or to hand out leaflets to passersby." 67 F.3d at 391.[15] All that is proscribed is the conduct of following people closely down the sidewalk, crowding and impeding them, yelling at and badgering them -- conduct independently proscribable as assault, harassment, disorderly conduct, or intentional infliction of emotional distress. *Cf.* New York Penal Law § 240.25 (Consol. Supp. 1996), and § 240.26 (1984); *Galella v. Onassis*; *Brennan*; *Van Duyn; Calvert*; *Flamm*; all cited *supra* pp. 34-35.

Petitioners' final challenge to the "cease and desist" clause -- its purported vagueness -- must also be rejected. While Petitioners contend that they do not know what is encompassed by someone "verbally or non-verbally indicating they do not want to be counseled," this provision is capable of being understood by the person of average intelligence. Several common phrases and gestures in this culture, understood by everyone, mean "leave me alone," "no," or "go away." Moreover, the district court clarified that this provision requires clear and convincing

[15] Petitioners conceded at the *in banc* oral argument that this is the proper reading of the "cease and desist" clause. Oral Arg. Tr. 42-3.

evidence[16] that the targets "manifested their desire to be left alone in such a way that [the sidewalk counselor] could have reasonably been expected to understand and comply with that desire." (JA 97)

IV. Petitioners' Challenge to the Injunction Based on Subsequent Events, While Not Properly Presented, Shows that Certiorari Was Improvidently Granted.

Petitioners contend that in July 1993, when the district court dismissed the 42 U.S.C. § 1985(3) claim with leave to amend,[17] Respondents were left without a cause of action supporting injunctive relief, Pet. Br. 31-33, even though the district court also based injunctive relief on some of the remaining state law claims. This argument essentially seeks review of the district court's decision not to vacate the preliminary injunction. 828 F. Supp. 1018 (W.D.N.Y. 1993). In unanimously affirming this decision, the initial Second Circuit panel noted that Petitioners never raised this challenge below. 67 F.2d at 367-68. Petitioners neither sought *in banc* review of this decision, nor raised this issue in their petition for a writ of certiorari. Thus, whether the federal and state causes of action now in the case assert sufficient legal "interests" to warrant injunctive relief is not properly before this Court. As this Court held in *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 285 (1993), refusing to vacate a similar injunction, the district court is the proper initial forum for determining what state or federal law bases may exist to support

[16] Since *International Union, United Mineworkers of America v. Bagwell*, 114 S. Ct. 2552 (1994), contempt proceedings in this case have been criminal; thus, proof beyond a reasonable doubt is now required.

[17] Respondents subsequently filed an amended complaint and reasserted a § 1985(3) claim based on both the "hindrance" and "deprivation" clauses of that statute. (R.471) The district court has not yet ruled on motions pertaining to this amended complaint. (R. 476, 478)

injunctive relief after dismissal of the 42 U.S.C. § 1985(3) claim. Should this Court conclude that the legal claims supporting injunctive relief require reexamination in light of post-1992 legal developments, rather than ruling on an improperly preserved question, the proper course is to dismiss the writ of certiorari as improvidently granted. *See, e.g., Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Phillips Corp.*, 510 U.S. 27 (1994); *Springfield v. Kibbe*, 480 U.S. 257 (1987).

Although Petitioners have not properly preserved their challenge to the 1993 district court decision, their invocation of one of the many events subsequent to the February 1992 preliminary injunction demonstrates that the order has become legally and factually stale in the intervening four and a half years.

Shortly after the issuance of the preliminary injunction, defendants resumed the blockade tactic with a resounding flourish. During the so-called "Spring of Life" Operation Rescue campaign against Buffalo clinics in April and May of 1992, hundreds of demonstrators took part in mass blockades at plaintiffs' health care facilities. These blockades often erupted into physically violent altercations, R. 171, 176, and hundreds of demonstrators, including many of the named defendants, were arrested. *See* Brief Amicus Curiae of Feminist Majority Foundation. The repeated violations of the preliminary injunction during this siege resulted in criminal contempt charges against six individual Operation Rescue leaders, *In re Slovenec*, 799 F. Supp. 1441 (W.D.N.Y. 1992), who subsequently pled guilty. In the summer of 1993, defendants again staged a series of blockades, including using children to lie or sit in driveways. R. 373-76. Additional criminal convictions resulted. *United States v. Walker*, 94-Cr-32S (W.D.N.Y. 1995). The district court noted the "Spring of Life" blockades and the subsequent criminal contempt proceedings when it refused to vacate the preliminary injunction. 828 F.Supp. at 1029. Yet another series of criminal contempt convictions resulted from additional violations in 1994, including several incidents of obstructing driveway entrances and screaming right in the face of

patients who asked to be left alone. *United States v. Boldt & Walker*, 95-Cr-17E (W.D.N.Y. 1995).

In addition to the increased blockading and harassment, the controversy now encompasses new locations. Three plaintiffs relocated, resulting in a motion by plaintiffs to modify the injunction in light of how the defendants' activities affected the new physical locales. R 454. Defendants insisted that any modifications should await resolution of all appeals. Two additional providers intervened as plaintiffs when they were threatened with disruptions, R. 166, 398, and new defendants have been joined. R 423, 434.

These subsequent events demonstrate that no matter what this Court were to say about the now outmoded four and one half year old preliminary injunction, which unfortunately has been woefully insufficient to preserve law and order, the district court will no doubt have to fashion a new injunction with a more adequate buffer zone. Even Petitioners and the dissenters below concede that blockades in defiance of a prior injunction warrant absolute "across-the-street" buffer zones like that upheld in *Madsen*. Pet. Br. 29-30; 67 F.3d at 400-01.

Based on these changed circumstances, this Court should dismiss the writ of certiorari as improvidently granted to allow the district court to craft an updated injunction responsive to the new factual and legal developments. *Taggart v. Weinacker's, Inc.*, 397 U.S. 223 (1970) (dismissing writ granted to review five year old injunction against picketing because of changed circumstances). Unlike *Taggart*, where the activities giving rise to the injunction had subsided, here they have significantly escalated, making the need for the district court to evaluate relief in light of the full, non-stale record even more compelling. For this Court to act now, in the face of such exacerbated subsequent circumstances, would be an inefficient use of judicial resources; subsequent appellate review after the district court has had the opportunity to update the injunction would be much more informed to the actual nature of the present controversy.

Because the case constitutional question here demands a fact-intensive analysis, it is especially important to base review of injunctive relief on complete and up-to-date facts. This Court would be well within its discretion to dismiss the writ in light of the stale and incomplete factual record now presented. *See, e.g., Estes v. Metropolitan Branches of Dallas NAACP*, 444 U.S. 437 (1980) (dismissing writ because of insufficient record in case involving complex, precisely tailored desegregation injunction); *Johnson v. Massachusetts*, 390 U.S. 511 (1968); *Smith v. Mississippi*, 373 U.S. 238 (1963) (dismissing writ because factual record relevant to constitutional claims insufficient).

CONCLUSION

For the foregoing reasons, the decision of the *in banc* U.S. Court of Appeals should be affirmed, or in the alternative the writ of certiorari should be dismissed as improvidently granted.

Respectfully submitted,

LUCINDA M. FINLEY*
SUNY at Buffalo Law School
O'Brian Hall -- North Campus
Buffalo, N.Y. 14260
(716) 645-6152

* Counsel of Record

MARTHA F. DAVIS
DEBORAH A. ELLIS
YOLANDA S. WU
NOW Legal Defense
and Education Fund
99 Hudson Street
New York, N.Y. 10013
(212) 925-6635

Attorneys for Respondents